

NTSB Order No. EA-4670

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 3rd day of June, 1998

Respondent.

Docket SE-14309

The Administrator has filed a petition for reconsideration of our decision, NTSB Order No. EA-4530, served March 12, 1997. In that decision, we dismissed the Administrator's complaint, finding that respondent's mistaken acceptance of a clearance meant for another aircraft should not result in a finding that he violated 14 CFR 91.123(b) and (e) and 91.13(a).¹ The Administrator argues that we erred in failing to defer to her reasonable interpretation of § 91.123 and that our action is arbitrary, capricious, and is a threat to air safety. We

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disagree, and deny the Administrator's petition.²

Respondent was the non-flying pilot-in-command of Northwest Flight 1024. Respondent mistakenly acknowledged a clearance meant for American Airlines Flight 94. At the hearing before the law judge, there was no dispute that respondent's acknowledgment to ATC was squelched, as respondent attempted to answer ATC at the same time that the American Airlines flight was responding. The tape exhibited background noise and the FAA's pilot deviation report indicated a stepped-on transmission. EA-4530 at 2. Our decision to dismiss the complaint was based on a simple proposition we have applied in a number of cases over the last few years -- if a pilot makes a mistake and mishears a clearance or ATC direction, follows all prudent procedures that would expose the mistake (e.g., reads back the clearance), and then acts on that mistaken understanding having heard no correction from ATC, the regulatory violation will be excused if that mistake is not shown to be a result of carelessness or purposeful failure of some sort. See, e.g., Administrator v. Fromuth and Dworak, NTSB Order No. EA-3816 (1993).

In this case, the law judge made a credibility determination in favor of the Northwest crew, and the FAA appears to have acknowledged that the Northwest aircraft responded, but that the response was squelched by the simultaneous American Airlines' transmission. See infra. We distinguished between an "error of perception," which should not be sanctioned, and an error caused by a failure of attention or some other careless or unprofessional behavior.

The Administrator argues that this approach substitutes our interpretation for hers, and thereby fails to defer to her reasonable interpretation of the regulation, as 49 U.S.C. 44709 requires. In her petition, she discusses the split enforcement model, and the respective roles of the FAA and this Board. Regarding the issue before us, she argues that § 91.123 "obligates airmen to listen, hear, and comply with all ATC instructions except in an emergency." Petition at 7.³ The Administrator goes on to explain,

Inattention, carelessness, or an unexplained misunderstanding, do not excuse a deviation from a clearly transmitted clearance or instruction. When there is an "error of perception" resulting in a deviation,

² We grant respondent's unopposed motion for an extension of time to submit his reply, as doing so does no harm to the Administrator. We also accept the Administrator's supplemental filing.

³ The FAA also agrees that equipment failure can excuse the violation. Petition at 12.

inattentiveness or carelessness are [sic] imputed in the absence of some reasonable explanation for the failure to comply with the ATC clearance.

Petition at 7-8.

We agree with the Administrator's discussion of the split enforcement model and with our general obligation to defer to the FAA's validly adopted interpretation of its regulations. However, the FAA cites no rule it has adopted that stands for the proposition the FAA urges here. Instead, as respondent notes in his reply, the interpretations the Administrator cites to support her argument are our precedent, developed through our case law. As a principle of administrative law, we may modify our precedent as the case requires, provided we explain our decisionmaking, and our conclusions are not arbitrary or capricious. We have done so over time with regard to this issue, with the FAA often in disagreement.⁴ In any case, the FAA has here offered us no evidence of any policy guidance written by the FAA, validly adopted or otherwise, for the proposition it argues here. Counsel's litigation statements are not such policy guidance. Although it here acknowledges that "some reasonable explanation for the failure to comply" with the clearance will excuse the violation, it offers no written discussion, adopted as FAA policy, with notice to airmen, that discusses the circumstances when this would occur. Thus, it is our view that we are not obliged to defer in this instance.

We also disagree with the FAA's underlying belief that our policy threatens aviation safety. The premise of our approach is this -- human beings make mistakes, and there is no regulatory action, remedial or otherwise, that can eliminate all mistakes. Our precedent does not attempt to excuse mistakes due to proven carelessness or demonstrated inattention, but it does attempt to recognize that where an inevitable error of perception does occur, the pilot should not face sanction if he has acted responsibly and prudently thereafter, *i.e.*, taken those actions that are expected of the responsible pilot and that would expose the error (*i.e.*, made the readback). The FAA is, of course, free to adopt more specific intra-cockpit and cockpit-ATC communication rules to minimize the possibility of clearance deviations. We do not see our decision here as treating better airmen who, in the FAA's words, have "no legitimate excuse for misperceiving" a clearance than airmen who "offer an excuse"

⁴ The FAA takes a too narrow view when it limits the cases where we have excused violations to those where ATC was found to be a contributing factor. The critical issue is the *pilot's* performance, not *ATC's*. Similarly, we see no inconsistency here with Fromuth and Dworak, *supra*.

(explanation?) for misperceiving a clearance. Our precedent supports viewing each circumstance individually and determining whether the pilot's actions and testimony (credibility as a witness being a critical issue) warrant dismissal or a finding of regulatory violation, and if the latter, whether there were mitigating circumstances that warrant sanction waiver or modification.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's reply is accepted for filing, as is the Administrator's Citation to Supplemental Authority; and
2. The Administrator's petition for reconsideration is denied.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above order.